LIBRARY
SUPREME COURT. U. S.

Office Supreme Court, U.S.
FILED
JUN 13 1958
JOHN T. ... EY, Clerk

IN THE

# Supreme Court of the United States

October Term, 1957

No. ~~1057~~ 101

WILLIAM VINCENT VITARELLI, *Petitioner*

v.

FRED A. SEATON, Secretary of the Interior of the United States, HARRIS ELLSWORTH, Chairman, CHRISTOPHER H. PHILLIPS, and FREDERICK J. LAWTON, Members of the Civil Service Commission of the United States, *Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CLIFFORD J. HYNNING
1821 Jefferson Place, N. W.
Washington 6, D. C.

*Of Counsel:*
ALLEN S. OLMSTED, 2ND, ESQ.
SAUL, EWING, REMICK & SAUL
Packard Building

## INDEX


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Constitutional Provisions, Statutes and Regulations Involved | 4 |
| Statement of the Case | 4 |
| Reasons for Granting the Writ | 10 |
| Conclusion | 24 |


## CITATIONS

Cases:


*Alabama State Federation of Labor* v. *McAdary*, 325 U.S. 450, 461, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945) ..... 24

*Alpert* v. *Board of Governors*, 286 App. Div. 542, 145 N.Y.S. 2d 534 (1955) ..... 15

*Bailey* v. *Richardson*, 86 U.S. App. D.C. 248, 182 F. 2d 46; 341 U.S. 918, 95 L. Ed. 1352, 71 S. Ct. 669 (1951) ..... 15, 16

*Cole* v. *Young*, 96 U.S. App. D.C. 379, 226 F. 2d 337 (1955) ..... 17

*Cole* v. *Young*, 351 U.S. 536, 100 L. Ed. 1396, 76 S. Ct. 861 (1956) ..... 3, 9, 11, 13, 15

*Columbia Auto Loan Co.* v. *Jordan*, 90 U.S. App. D.C. 222, 196 F. 2d 568 (1952) ..... 14

*Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117, 70 L. Ed. 494, 46 S. Ct. 215 (1925) ..... 14

*In re Carter*, 89 U.S. App. D.C. 310, 192 F. 2d 15 (1951), cert. den. 342 U.S. 862, 96 L. Ed. 648, 72 S. Ct. 89 ..... 14

*In re Isserman*, 348 U.S. 1, 99 L. Ed. 1, 75 S. Ct. 6 (1954) ..... 14

IN THE

# Supreme Court of the United States

October Term, 1957

---

No.

---

WILLIAM VINCENT VITARELLI, *Petitioner*

v.

FRED A. SEATON, Secretary of the Interior of the United States, HARRIS ELLSWORTH, Chairman, CHRISTOPHER H. PHILLIPS, and FREDERICK J. LAWTON, Members of the Civil Service Commission of the United States, *Respondents*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

The petitioner, William Vincent Vitarelli, prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The memorandum of the Secretary of the Interior[1] suspending petitioner under Department Order 2738 is

---

[1] This letter is not technically part of the record of the case, since it was not introduced at the trial court, but was printed as Appellant's Appendix B (R. 12-15). Specific references to the letter were made by the opinion of the Court of Appeals, 253 F. 2d 338, 340, 342, 343.

printed as Appendix B to this petition, *infra*, pp. 35-39. The "Findings and Final Determination" of respondent Secretary, dated September 2, 1954, ordering the termination of petitioner's employment "in the interest of national security," is printed at R. 44-46.[2] The order of the District Court, dated October 29, 1956, is unreported and is printed at R. 52. The opinion of the Court of Appeals is reported at 253 F. 2d 338 and is printed as Appendix C to this petition, *infra*, pp. 41-48.

## JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED

In filing his suit petitioner sought (i) a declaratory judgment that his removal by respondent Secretary as a "security risk" under the purported authority of the Act of August 26, 1950, be set aside as illegal and void and (ii) a mandatory injunction directing petitioner's reinstatement to his position as educational officer in the Department of the Interior, with all the rights incident thereto. Respondents thereupon voluntarily expunged the records of the Department of the Interior and the Civil Service Commission of "all adverse statements with respect to plaintiff as a 'security risk' under Executive Order 10450." The case was heard on cross motions for summary judgment at the conclusion of which the District Judge granted summary judgment for respondents on the ground that the court could not order the reinstatement of an employee whose tenure "is only at the will of the employing Government." The Court of Ap-

[2] References to the record "(R. ——)" are to the Joint Appendix as printed in the court below (R. 11-52).

peals affirmed on the ground that the treatment accorded petitioner "was in no way arbitrary, or lacking in due process" and that he "was legally discharged, even though the proceedings were improperly labelled," and that the voluntary expunging of the records, which had already been effected, was "the maximum relief" to which petitioner was entitled. The questions presented are:

1. Whether a "security risk" removal with defamatory consequences violates petitioner's constitutional rights where made under wrongful authority or merely amounts to what the court below termed "improperly labelled" proceedings against an employee lacking statutory job rights?

2. Whether, in the latter event, a finding of "untrustworthiness" by respondent Secretary, purportedly made under his Departmental Security Regulations, survives a voluntary expunging by respondents of all records of "any adverse statements" so as to furnish a "rational" foundation for ordering petitioner's removal?

3. Whether respondent Secretary, having by his own Departmental regulations and proceedings thereunder specifically subjected petitioner to the formalities of a hearing "in the interest of the national security," furnished petitioner with (a) charges stated with sufficient specificity so as to enable petitioner, on the assumption of innocence, to prepare an adequate defense, and (b) a fair and impartial hearing free from partisanship?

4. Whether the "security risk" dismissal of a concededly loyal educator from a "non-sensitive" position—involving no element of the national security as defined in *Cole*—can be effected after the formalities of a "hearing" solely on the basis of secret reports?

5. Whether respondent Secretary, who had discharged petitioner in 1954 as a "security risk," confessedly under the wrongful authority, could discharge petitioner again

two years later (1956), after the institution of this suit, by the device of predating a second discharge paper and expunging the references to his being a "security risk," or must respondent Secretary first reinstate petitioner?

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves:

(1) The Fifth Amendment to the Constitution of the United States, printed in Appendix A, *infra*, p. 26.

(2) Executive Order 10450, issued April 27, 1953, printed in Appendix A, *infra*, pp. 26-27.

(3) Department of the Interior, Order No. 2738, Security Regulations, dated November 9, 1953, which are printed in Appendix A, *infra*, pp. 28-33.

## STATEMENT OF THE CASE

This case comes to this Court from the affirmance of the order of the trial court (R. 52) which granted respondents' motion for summary judgment and denied petitioner's cross motion for summary judgment. The trial court order, however, stated that respondents conceded their action was not authorized under the Act of August 26, 1950, and that respondents

> "have taken all practical steps, short of reinstating plaintiff or giving him back pay, to remove the stigma, if any, which may have resulted from his removal by expunging from the records of the Department of the Interior and the Civil Service Commission all adverse statements with respect to plaintiff as a 'security risk' under Executive Order 10450."

Neither party introduced testimony in the trial court.[3]

---

[3] Save for such references to a newspaper clipping (Appendix B, p. 34), the letter of charges (Appendix B, pp. 35-39); and the

Petitioner is a professional educator, holding a doctor's degree from Columbia University, who was employed by the Department of the Interior in the Education Department of the Trust Territory of the Pacific Islands, at Koror in the Palau District. Under the general employment policy of the Government for overseas personnel outside the Foreign Service, petitioner held a so-called "Schedule A" position excepted from the classified civil service, had completed his trial period, and held an "indefinite appointment." He had rendered full and completely satisfactory service in his position as education and training specialist, which he had held for some three years, had received official ratings of "satisfactory" and "excellent," and had secured many favorable commendations from his superiors. At the time of his suspension in 1954, petitioner was receiving a salary of $6,140 per year plus the 25% overseas differential. Respondents have conceded that his position at no time had been designated a "sensitive position."

Petitioner first learned of his probable suspension from the headlines of a Guam newspaper under date of March 13, 1954 (Appendix B, p. 34), which stated: "Security Probe in Trust Isles—Five Employees Will Be Ousted as 'Bad Risks,'" and listed one as a "known conscientious objector" who as "an advocate of pacificism is out of place in so sensitive and strategic an area as the Trust Territory." Thus commenced the official defamation of petitioner. While petitioner's pacificism was not subsequently cited in the charges against him, it still remained the subject of questioning at his hearing.

---

transcript of the so-called hearing before the security hearing board as are necessary to explain how this case arose, the statement of the case is based on the facts of record. The essentials of the security hearing were also set forth in testimony before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee on November 23, 1955, and printed as part of its proceedings pursuant to S. Res. 94, 84th Congress, 2nd Session, pp. 653-71.

Approximately one month later, on or about April 3, 1954, petitioner received an abstract of a letter from respondent Secretary, suspending him, without at that time stating any of the charges. The full text of the letter setting forth certain charges against him (Appendix B, pp. 35-39) was received on or about April 8, 1954. Petitioner was initially denied travel authority to proceed from Koror to Washington, D. C. "at government expense unless resigning." After seeking to borrow travel funds in Koror, petitioner was later authorized to proceed to Washington for the purpose of answering the charges. He perforce left his wife and four children in Koror for many months. Petitioner filed with respondent Secretary a written answer, together with 44 affidavits concerning his loyalty and character, but was informed on June 11, 1954, that there were not "sufficient grounds to reinstate" him.

On June 22 and July 1, 1954, petitioner, together with counsel and four witnesses, appeared before a so-called security hearing board. Petitioner was not confronted with any evidence against him and did not have the right to subpoena witnesses, or to cross-examine his accusers, whoever they might be. Nor was he given the text of the statements that had allegedly been made against him. In his testimony petitioner categorically denied membership in or affiliation or sympathetic association with the Communist Party or its sympathizers and gave a complete, candid and factual explanation of the matters contained in the written charges. The security officer of the Department of the Interior conceded on the record that petitioner's loyalty was not in issue, as appears from the following exchange:

> "Mr. Olmsted [counsel for appellant]: * * * Does Mr. Armstrong [then assistant solicitor and security officer, Department of the Interior] question his loyalty to the United States?

Mr. Armstrong: No, I think I perhaps didn't elaborate my very first statement this morning sufficiently. * * * Of course, in the Oppenheimer case the board recommended to AEC to dismiss him as a security risk although they said he was perfectly loyal.

Mr. Olmsted: That is why I am asking here, is it agreed that he is perfectly loyal or should I produce some evidence that he is perfectly loyal?

Chairman Towson [who presided at hearing]: The only thing before this Board is incorporated in the letter of charges. As I recall he is not charged with disloyalty.

Mr. Armstrong: That is right. The question is only whether he is a security risk." (Transcript of hearing, pp. 175-76.)

The transcript of the hearing shows that petitioner was examined in particular on whether he thought the security program was a Republican plot to get rid of Democrats,[4] on racial equality,[5] on discrimination against Jews,[6] on whether he had "heard" of a great variety of organizations which were not listed in the letter of charges,[7] on

---

[4] "Mr. Armstrong [then assistant solicitor and security officer for the Department of the Interior]: Do you think that the Security program undertaken by Executive Order 10450 is politically inspired from the Republican administration?" Transcript, p. 15.

[5] "Mr. Armstrong: What were your feelings at that time [1943] concerning race equality?" *Ibid.*, p. 24.

[6] "Mr. Armstrong: Do I interpret your statement correctly that maybe Negroes and Jews are denied some of their constitutional rights at present?" *Ibid.*, p. 32.

[7] "Mr. Armstrong: Do you recall an organization by the name of National Council for Soviet-American Friendship? * * * How about the Southern Conference for Human Welfare? * * * What is the organization called the Joint Anti-Fascist Refugee Committee? * * * Have you ever had any contact with the Negro Youth Congress? * * * How about Abraham Lincoln Brigade? * * * Did you become active in the Progressive Party in that year (1948)? * * * Have you ever heard of a magazine called

Black Mountain transcendentalism,[8] whatever that may be, on his votes for President and Vice-President,[9] on whether he was "quite hepped up over the one-world idea,[10] and whether he was "still [i. e., June, 1954] a "strong advocate of the United Nations."[11]

On September 2, 1954, respondent Secretary issued his "Findings and Final Determination" (R. 44-46) that it was "advisable and necessary that the employment of William Vincent Vitarelli should be terminated in the interest of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954," without stating which of the charges, if any, were sustained against him. Petitioner's employment was terminated as of the close of business on September 10, 1954. Standard Form 50 of the United States Civil Service Commission, entitled "Notification of Personnel Action," was issued under date of September 21, 1954 (R. 46), designating the personnel action with respect to petitioner as "TERMINATION" and "being taken in accordance with the provisions of Executive Order 10450." This completed the process of labelling petitioner a "security risk."

By petition presented to the then Undersecretary of the Interior on October 25, 1955, petitioner applied for reinstatement or a rehearing, which was denied on May

---

'Cooperative Union'? * * * I was wondering whether you had ever heard of Consumers Union?" *Ibid.*, pp. 98, 100, 101, 102, 103, 112, 113.

[8] "Mr. Armstrong: Do you know what Black Mountain transcendentalism is?" *Ibid.*, p. 97.

[9] *Infra.*, p. 22.

[10] "Mr. Armstrong: The file indicates, too, that you were quite hepped up over the one-world idea at one time; is that right?" *Ibid.*, p. 131.

[11] "Mr. Armstrong: At one time, or two, you were a strong advocate of the United Nations. Are you still?" *Ibid.*, p. 132.

11, 1956. On June 12, 1956, petitioner by his attorney made a written demand upon respondent Secretary to restore him to duty forthwith in accordance with the decision of this Court in Cole v. Young, 351 U.S. 536, 100 L. Ed. 1396, 76 S. Ct. 861 (1956), but respondent Secretary failed to comply with this demand, whereupon petitioner brought action in the United States District Court for the District of Columbia on July 10, 1956 (R. 10-22).

Pursuant to the Rules of Civil Procedure, petitioner gave notice to respondents for the taking of oral depositions of certain officials of the Department of the Interior and the Civil Service Commission, listing specific matters of inquiry as peculiarly within the knowledge of respondents. The scope of the discovery and the opposing reasons were, *inter alia*, set forth by petitioner and respondents as follows:

*A. Petitioner's discovery*

7. Why was not plaintiff simply removed without charges, without procedures and without infamy in view of his lack of competitive status under a Schedule A appointment?

8. Why did defendant Secretary insist upon imposing "a badge of infamy" on plaintiff by making a finding that the employment of plaintiff be "terminated in the interest of the national security" under the purported authority of E.O. 10450 and the Act of August 26, 1950?

*B. Respondents' reasons for opposing discovery*

7. and 8. . . . These questions clearly relate to matters which are hypothetical and immaterial. The only relevant legal issue herein is whether the procedures in fact employed by the defendant Secretary in accomplishing plaintiff's discharge were legal and valid. Neither the existence of any other procedure which could have been used to discharge plaintiff nor the reason why it was not in fact employed can have any possible relevance herein.

On October 1, 1956, noting the above quoted language of respondents in 7 and 8 "on the understanding that this is a concession of record and binds the Defendants not to depart from that position," petitioner thereby withdrew his opposition to respondents' motion for a stay of discovery proceedings and filed a cross motion for summary judgment.

On October 16, 1956, the case was heard on cross motions for summary judgment, at the conclusion of which United States District Judge James W. Morris ruled that he would grant summary judgment for the respondents because he questioned whether he possessed the power to order the reinstatement of a governmental employee whose tenure was at the will of the employing department and as such excepted from the protection available to employees in the classified civil service (R. 49-52). The final order was issued on October 29, 1956 (R. 52). The Court of Appeals affirmed the case on February 13, 1958 (Appendix C). On May 5, 1958, Chief Justice Warren issued an order ex parte extending the time to file petition for certiorari until June 13, 1958.

## REASONS FOR GRANTING THE WRIT

The Court of Appeals (Appendix C) has held: (a) that even though a governmental employee lacking statutory job protection is "entitled to be free from dismissal on unconstitutional or flagrantly arbitrary grounds," the treatment of petitioner by respondent Secretary "was in no way arbitrary or lacking in due process" and that petitioner had been "legally discharged even though the proceedings were improperly labelled" as a security proceeding; (b) that one of the grounds of dismissal furnished a "clear basis" for the Secretary's action in removing petitioner, namely untrustworthiness, and that courts properly refuse to review the evidence or to examine the merits of an executive finding of untrustworthi-

ness; (c) that a charge of untrustworthiness survives the voluntary expunging from the record of "any adverse findings" under a security proceeding; and (d) that the maximum relief to which petitioner would be entitled would be the expunging of the record, which had already occurred, and that petitioner in no event would be entitled to reinstatement.

The dissent by Judge Fahy found that the charge of untrustworthiness could not be be read "as in any sense independent" of the expunged charges which had been made under E. O. 10450 and the Act of August 26, 1950; that under the ruling of this Court in *Cole* "the basis for the original termination disappears, and with it the validity of that termination"; and that the second termination notice "could not relate back as attempted."

The majority result is a decision in conflict with Service v. Dulles, 354 U.S. 363, 1 L. Ed. 2d 1403, 77 S. Ct. 1152 (1957), which resulted in the reinstatement[12] of a governmental employee dismissed under procedure which was in conflict with Departmental regulations; with Perkins v. Elg, 307 U.S. 325, 83 L. Ed. 1320, 59 S. Ct. 884 (1930), which held that executive discretion must be exercised in accordance with the agency's own regulations; with Cole v. Young, 351 U.S. 536, 100 L. Ed. 1396, 76 S. Ct. 861 (1956), which held that a governmental employee in a "non-sensitive" position could not be summarily removed on security grounds under the Act of August 26, 1950; with Parker v. Lester, 227 F. 2d 708 (9th Cir., 1955), which held that "perpetuating a doubt-

[12] The court below cited its own decision in *Service* to support its refusal to direct petitioner's reinstatement, asserting that its decision was reversed on "other grounds" by this Court. The fact of the matter is that this Court reversed the Court of Appeals and remanded the case to the District Court, with the result that Service was reinstated and is again an official of the Department of State.

ful system of secret informers . . . cannot justify an abandonment here of the ancient standards of due process"; and with Simmons v. United States, 348 U.S. 397, 99 L. Ed. 453, 75 S. Ct. 397 (1955), which held that a hearing should not "be conducted on the level of a game of blindman's bluff."

At the outset petitioner readily concedes that, as an overseas "Schedule A" employee, he held a position excepted from the classified civil service and accordingly lacked tenure under the Lloyd-LaFollette Act, that he has no rights under the Veterans' Preference Act, and is not in any manner covered by the Foreign Service Act. Absent the security regulations of the Department of the Interior, petitioner would not be disposed to question the authority of respondent Secretary to have removed him without the filing of charges, without hearing or other procedures and—be it carefully noted—*without infamy* to himself or to his family.

This case does not present any question of the power of management to discharge an employee considered unsuitable without charges or a hearing. Such an employee lacking statutory job protection may be reassigned, demoted, or discharged for no reasons at all. Respondent Secretary could have done so in this case. He did not do so. What respondent Secretary did was to initiate a formidable proceeding for the proclaimed purpose of determining whether petitioner's removal was required by "national security"—an adjudication of status. The issue here is whether respondent Secretary can defame and stigmatize petitioner as a threat to the security of his country through following the formalities of an adjudicatory proceeding without observing the most elementary requirements of a fair hearing.

Nor does this case involve the right of respondent Secretary to use secret information in the course of personnel management. The issue here is whether respond-

ent Secretary, while relying on the formalities of a security hearing, can use confidential information from anonymous informants for the purpose of condemning petitioner as a *security risk* in a situation where whatever security interests may have been involved could have been readily satisfied by simply dismissing petitioner without charges and without the formalities of a hearing.

Our reasons in detail are:

1. *The defamatory dismissal of petitioner as a security risk under the wrongful authority and without any basis of record was no mere error in "labelling."* The constitutional issue presented relates to rights of an American educator to pursue his profession of teaching without being "improperly labelled" with a "badge of infamy" through removal as a "security risk" by respondent Secretary under the wrongful application of the authority of the Act of August 26, 1950, and E.O. 10450. Under *Cole* this Court held that the removal of a governmental employee from a non-sensitive position is beyond the authority of the Act of August 26, 1950. Respondents argued, and the court below agreed, that *Cole* does not avail petitioner because he was outside the classified civil service and accordingly had no statutory rights which were violated by his removal. While petitioner may lack statutory rights in the protection of his job, he has a constitutional right not to be defamed without lawful authority.

The right of a professional man to follow his calling, for which he has been trained and recognized by the competent authorities, is a property right entitled to due-process protection by the courts, unless he has forfeited such protection by some act or habit that would justifiably bar him from the educational field. Truax v. Raich, 239 U.S. 33, 60 L. Ed. 131, 36 S. Ct. 7 (1915). These due-process standards and procedures have been applied to

the revocation of professional licenses of lawyers, seamen, insurance agents, and professional bondsmen.[13]

This Court has repeatedly recognized that "substantial rights affecting the lives and property of citizens are at stake" where a public employee has been removed on grounds of disloyalty or security. Peters v. Hobby, 349 U.S. 331, 347; 99 L. Ed. 1129, 75 S. Ct. 790 (1955). Dr. Peters himself held a "Schedule A" appointment, it is noted by this Court (note 24 on p. 347), the precise type of appointment held by the petitioner here.[14] In recognizing that "a badge of infamy" attaches to a public employee dismissed on grounds of disloyalty, *Peters* was but following the earlier decision of this Court in Wieman v. Updegraff, 344 U.S. 183, 190-191; 97 L. Ed. 216, 73 S. Ct. 215 (1952). In the same term with *Cole*, which involved the rights of a Federal civil servant, this Court also decided Slochower v. Board of Higher Education of the City of New York, 350 U.S. 551, 100 L. Ed. 692, 76 S. Ct. 637 (1956), where the summary dismissal of a professor of German in Brooklyn College on the ground that he had used the Fifth Amendment at a hearing before a Congressional committee was held invalid.

---

[13] *In re Isserman*, 348 U.S. 1, 99 L. Ed. 32, 75 S. Ct. 6 (1954); *Parker* v. *Lester*, 227 F. 2d 708 (9th Cir. 1955); *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117, 70 L. Ed. 494, 46 S. Ct. 215 (1925); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957); *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722 (1957); *Columbia Auto Loan Co.* v. *Jordan*, 90 U.S. App. D.C. 222, 196 F. 2d 568 (1952); *In re Carter*, 89 U.S. App. D.C. 310, 192 F. 2d 15 (1951), cert. den. 342 U.S. 862, 96 L. Ed. 648, 72 S. Ct. 89.

[14] Dr. Peters held a term appointment which by its own terms had expired at the time of this Court's decision, which rendered moot the matter of reinstatement, and his compensation was only for time actually worked, which rendered moot the question of back pay. Here petitioner, however, held an indefinite appointment of a full-time position.

Even though it may be conceded as an abstract proposition that petitioner may have had no constitutional right to work for the Department of the Interior, it is submitted that having once been so employed as an educational officer, he thereby acquired a substantive right of property in "a species of tenure and cannot be capriciously excluded and thereby injured financially and professionally." Alpert v. Board of Governors, 286 App. Div. 542, 145 N.Y.S. 2d 534 (1955).

The court below recognized the force of the above decisions when it concluded that "Persons situated as was the appellant are, we may assume, entitled to be free from dismissal on unconstitutional or flagrantly arbitrary grounds." But then it went on to hold that "no such dismissal occurred here" and that the "treatment accorded appellant was in no way arbitrary, or lacking in due process. He was given written charges, and an opportunity to answer them, together with a hearing." The court below relied [15] heavily on its own decision in Bailey v. Richardson, 86 U.S. App. D.C. 248, 182 F.2d 46, affirmed by an equally divided Court, 341 U.S. 918, 95 L. Ed. 1352, 71 S. Ct. 669 (1951). It also pointed out that in both *Cole* and *Service* this Court had based its decision on "Congressional restrictions" on dismissals, whereas in this case there were no such restrictions applicable to the removal of petitioner. In effect, the court below held that petitioner's constitutional rights, unless implemented by some Congressional restriction, were not violated by his removal as a security risk.

The affirmation of *Bailey* by an equal division of this Court was done on premises which have since been clearly rejected by this Court in *Peters* and *Wieman*. The cornerstone of *Bailey* was the ruling that "the due process clause does not apply to the holding of a government

[15] See court's "emphasis added" in its note 3.

office" and that there is no basic right to government employ (182 F. 2d 57, 60-61), but *Peters* and *Wieman* clearly held to the contrary. Nor did *Bailey* deem the stigma of disloyalty discharge distinctive from discharge on other grounds (at p. 64), while this Court has "emphasized the unique and terrible consequences following from an adjudication that an employee is disloyal or that his continued employment will adversely affect the national security." Unless *Bailey* is explicitly overruled, it will remain at the core of the constitutional problem in security cases, especially in lower courts, which have been prone to let justice in this area depend upon appeal to this Court.

2. *Respondents, having voluntarily expunged the record of all statements adverse to petitioner, lacked a rational foundation for finding petitioner untrustworthy.* Relying on second *Chenery* that an agency's conclusion will be disturbed "only if it lacks a rational and statutory foundation," Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194, 207, 91 L. Ed. 1995, 67 S. Ct. 1575 (1947), the court below found the dismissal of petitioner by respondent Secretary had both a "rational" foundation and a "sufficient 'statutory' foundation—the constitutional power of the executive to dismiss subordinates: a power not limited in the present instant by statute or regulation." Petitioner was held to have been legally discharged because, *inter alia* one of the grounds for dismissal "furnishes a clear basis for the Secretary's action"—the charge that was set forth in numbered paragraph 3 (relating to untrustworthiness) of the letter of charges (Appendix B, p. 38). A charge of untrustworthiness is sufficient to justify a discharge "even under the here inapplicable Lloyd-LaFollette and Veterans Acts." In its footnote 6 the court below noted, "The circumstance that the third ground of dismissal was intimately related to the first two [security] grounds would seem immaterial here." In the dissent, however, Judge Fahy pointed out that charge 3 or any finding

based thereon could not be read independently of Executive Order 10450 or the Act of August 26, 1950.

There is a very serious defect in this holding by the court below, for respondent Secretary's finding of untrustworthiness is contained in a document that has been voluntarily expunged by the respondents, as the court itself noted (pp. 42, 47) "of all adverse findings made with respect to Mr. William Vincent Vitarelli under Executive Order 10450."[16] How then, could the court below say that the charge of untrustworthiness and deliberate misrepresentation was found by the Secretary of the Interior "to have been sustained on the evidence before him" when "all adverse findings" had already been "expunged"—and that "voluntarily" by respondents?

3. *Respondent Secretary limited his authority to remove petitioner as a security risk only in accordance with his own Departmental security regulations.* The Departmental security regulations (Appendix A, pp. 28-33) provided that any employee charged on security grounds would be removed exclusively pursuant to the procedures of those regulations, as appears clear from Secs. 1 and 3, which state that *all* persons in the Department shall meet the minimum requirements of national security; from Sec. 6(c), which expressly exempts temporary and intermittent employees; and from Sec. 13 relating to the termination of temporary or probationary or trial employees. The implication is clear beyond any doubt that *all*[17] other employees, whether holding permanent or in-

[16] A mere reading of paragraph 3 shows plainly its origin—namely, E.O. 10450, §(8)(i) and (ii) which list "any behavior, activities or associations which tend to show that the individual is not reliable or trustworthy," and "any deliberate misrepresentation, falsifications, or omission of material facts."

[17] This was the theory not only of the Department of the Interior but of the entire Executive Branch under E.O. 10450 until this Court decided otherwise in *Cole*, and was once the prevailing theory of the court below. Cole v. Young, 96 U.S. App. D. C. 379, 226 F. 2d 337 (1955).

definite appointments, were subject to the Departmental security regulations.

From the above recital it must be clear beyond any cavil that respondent Secretary—whatever his authority might have been in the absence of these Departmental security regulations—had limited himself in effecting the removal of any employee on security grounds to effect such removal only according to the procedural safeguards of those regulations. In the words of this Court in *Service*, "Having done so he could not, so long as the regulations remain unchanged, proceed without regard to them." Contrary to the proceedings followed against Service, petitioner was informed by respondent Secretary that his case was being *exclusively* considered under the Departmental security regulations. Every contemporaneous official statement with respect to the termination of petitioner's employment denotes that the determination to remove him and the termination itself were made under the security order and no other authority.

As a governmental employee who had satisfactorily served his probational period, petitioner under Departmental security regulations was entitled upon his suspension "in the interest of national security" to:

(1) "A written statement of charges . . . as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit . . . ." [§ 15(a)]; and

(2) "A hearing before a security hearing board [which shall conduct hearings] in an orderly manner . . . and insure the employee of a full and fair consideration of his case . . . [including the right] to cross-examine any witness offered in support of the charges." [§ 21(a) and (c)].

A. *The security charges were not sufficiently specific to enable petitioner, on the assumption of innocence, to*

*defend himself.* As already related, *supra*, p. 6, it was conceded on the record of the security hearing that petitioner is and has always been loyal to the government of the United States. That being so, the only charges remaining against petitioner were as follows (Appendix B, pp. 37-38):

> "That in fact your associations with the said F—— were not fully divulged by you and that same were not casual but on the contrary were the associations of an intimate friendship; that in fact your associations with the said W—— were not fully divulged by you in that such associations were not solely connected with your teaching profession; and that you did know that both the said F—— and the said W—— were members of, affiliated with, or in sympathetic association with the Communist Party and numerous Communist front organizations
>
> • • • •
>
> "3. Your behavior, activities and associations tend to show that you are not reliable or trustworthy, and the facts above alleged furnish reason to believe that you have deliberately misrepresented, falsified or omitted material facts in connection with your said behavior, activities and associations, and that these facts also furnish reason to believe that you may be subjected to coercion, influence, or pressure which may cause you to act contrary to the best interests of national security."

Elemental fairness requires that charges preferred for removal must be "specific enough to provide a fair opportunity for refutation by the innocent who have no knowledge of the conduct charged, as well as the guilty who do possess such knowledge." Money v. Anderson, 93 U.S. App. D.C. 226, 208 F. 2d 34, 37-38 (1953).[18] A charge that petitioner had not told the entire truth concerning his relationship with certain individuals is clearly

---

[18] Followed in Manning v. Stevens, 208 F. 2d 827 (D.C., 1953). Also see Robert J. Morgan, "Federal Loyalty-Security Removals, 1946-1956." 36 Nebraska Law Review 412-46 (1951).

not sufficiently specific if it does not specify the times, places, and type of "close association" that have allegedly been omitted. If the accused has told the truth in stating his entire knowledge of the situation, how can he respond to a charge that he has left out some unstated matter, if that matter does not exist?

B. *A concededly loyal educator can not be removed from a non-sensitive position after a hearing solely upon the basis of undisclosed information furnished by secret informants.* There is no dispute that the security hearing board in recommending adversely concerning petitioner relied upon undisclosed information furnished by secret informants, and that respondent Secretary relied thereon in removing petitioner.

It is a constitutional principle that ". . . there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute." Interstate Commerce Commission v. Louisville & Nashville Railroad Company, 227 U.S. 88, 93, 57 L. Ed. 431, 33 S. Ct. 185 (1913). This Court has repeatedly held that "where the disclosure of an informant's identity, or the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Roviaro v. United States, 353 U.S. 53, 60-61, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957); Jencks v. United States, 353 U.S. 657, 1 L. Ed. 2d 1103, 77 S. Ct. 1007 (1957). While these cases involved criminal prosecutions, they stand broadly for the proposition that a party threatened with the deprivation of substantial rights, as is any party involved in a proceeding which may result in his being labelled a "security risk," is entitled to the fullest opportunity to defend himself.

This is no new doctrine. In Morgan v. The United States, 304 U.S. 1, 82 L. Ed. 1129, 58 S. Ct. 773 (1938),

this Court said, "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." In the absence of findings of fact,[19] there is no way to know which of several conflicting official explanations led to petitioner's removal (R. 25-26) whether it was his pacifism as publicly stated to the press, whether it was based on the charges as stated in respondent Secretary's final determination, whether it was based upon some undisclosed charges as stated by the solicitor of the Department of the Interior, or whether it was based on petitioner's alleged "lack of common sense" as stated by the personnel officer, or even upon no charges at all.

A new book on *The Law of the Civil Service* summarizes Federal and State court decisions on the nature of the hearing to be afforded a civil servant as follows:

> "Basically what is generally required to come within the purview of a fair hearing is that every reasonable opportunity must be granted to the accused employee to defend himself against the charges. He must be permitted to testify in his own behalf, be permitted to be represented by counsel where he wishes to, have his own witnesses testify and cross-examine any witnesses against him. It is not enough to include in the record of the hearing statements of witnesses as to what they would have testified were they present, or accept such statements in lieu of testimony; nor does giving the accused employee an opportunity at such hearing to make a statement satisfy the requirements of a formal hearing." H. Eliot Kaplan, *The Law of the Civil Service* (1958), pp. 234-235.

C. *The so-called hearing was not a fair hearing.* On the face of the transcript of hearing (*supra*, pp. 7-8), it is

---

[19] See Mulligan v. Andrews, 93 U.S. App. D.C. 381, 211 F. 2d 28, 30, 31 (1954), and Kutcher v. Higley, 98 U.S. App. D.C. 278, 235 F. 2d 505 (1956).

abundantly evident that the so-called security hearing board and security officer wandered far afield, without any discernible standards of relevance or materiality, from the matter set forth in the letter of charges. Probably the most colorful illustration of the kind of hearing afforded petitioner in 1954 is given in the following exchanges with respect to his votes for President in 1940 and 1948:

> "Mr. Armstrong [assistant solicitor and security officer for the Department of the Interior]: I think you indicated in an answer or a reply to an interrogatory that you at times voted for and sponsored the principles of Franklin Delano Roosevelt, Norman A. Thomas, and Henry Wallace?
> Mr. Vitarelli: That is correct.
> Mr. Armstrong: Norman Thomas was one of those perennial candidates on the Socialist ticket for President.
> Mr. Vitarelli: That is right.
> Mr. Armstrong: How many times did you vote for him if you care to say?
> Mr. Vitarelli: I never voted for Norman Thomas that I remember. I may have been in favor of a lot of his policies, but I don't remember voting for Norman Thomas.
> Mr. Armstrong: How about Henry Wallace?
> Mr. Vitarelli: I voted for Henry Wallace once.
> Mr. Armstrong: Back in 1948?
> Mr. Vitarelli: That is correct.
> Chairman Towson [Chairman of the security hearing board]: Just one question on that. Did you not vote for Henry Wallace when he was a candidate for vice-president?
> Mr. Vitarelli: Yes, I did.
> Chairman Towson: Then you voted for him once more, more than once?
> Mr. Vitarelli: That is true. I voted for the Roosevelt New Deal regime of which he was a member; that is true."

Thus did the security hearing board chairman test petitioner's trustworthiness in having stated under oath that he had once voted for Wallace!

4. *Where the basis contemporaneously used to remove petitioner legally fails, as here conceded, the removal itself fails, and petitioner is entitled to reinstatement, notwithstanding his lack of statutory job protection.*

Not until the government's answer and supporting memorandum was filed in the District Court in 1956 was there any suggestion that petitioner was removed as a "Schedule A" employee independently of the Executive Order and the Departmental security regulations under which the removal as a security risk was purportedly made in 1954. Respondents' suggestion, moreover, is squarely contradicted by every relevant word of the record as contemporaneously made and flies in the teeth of every document signed by respondents with respect to the termination of petitioner in 1954. Whether or not the Secretary of the Interior *could* otherwise have removed petitioner without charges, hearing, evidence or reason, the fact is that he did not do so, but purported to extend the procedural protection of the Departmental security regulations.

It is well established in law that where an administrative agency purports to act under certain authority or standards, its actions must be weighed in accordance with such announced authority or standards. Securities and Exchange Commission v. Chenery Corporation, 318 U.S. 80, 87, 95, 87 L. Ed. 626, 63 S. Ct. 454 (1943). But executive discretion which is based solely upon unlawful considerations is an abuse of discretion, and should under the decisions of this Court have been set aside by the District Court. Perkins v. Elg, 307 U.S. 325, 83 L. Ed. 1320, 59 S. Ct. 884 (1939).

It is now agreed by all parties that respondent Secretary lacked the legal authority to act under that Executive Order or the Act of August 26, 1950, inasmuch as petitioner's position had never been classified as a "sensitive position." It necessarily follows that the removal of peti-

tioner was unlawful under the authority used in fact. Nor can the removal be defended at this time on the *conjectural*[20] grounds that respondent Secretary could have removed petitioner as a "Schedule A" employee and that removal would not have been reviewable in court. The fact of the matter is that respondent Secretary never did so so long as petitioner was an employee of that Department. Neither logic nor justice should bar petitioner's reinstatement because he lacks civil-service tenure. The predating of Form 50 in 1956 is wholly without any legal effect, for petitioner was not then an employee of the Department of the Interior. Not being an employee, he could obviously not be discharged.

## CONCLUSION

In removing petitioner, the Secretary of the Interior acted unjustly, arbitrarily, and unlawfully. Petitioner has been subjected to an intensive inquisition into his personal affairs. His professional reputation has been so tarred that he has been unable to find a job in teaching.

The issues presented on this petition are important to all persons who are government employees in particular as well as to citizens who are concerned with the defamatory abuse of governmental power. These issues may be difficult, as the court below states (R. 51), for they concern the competing demands of justice for individuals and the security requirements of the nation; they involve con-

---

[20] Plainly a justification in terms of what the Secretary of the Interior *might have done*, if he had been so lawfully minded, is, and can be, no justification in a United States court exercising the judicial power under the Constitution of the United States. As Mr. Justice Stone has said, "It is the Court's 'considered practice not to decide abstract, hypothetical or contingent questions.'" Alabama State Federation of Labor v. McAdary, 325 U.S. 450, 461, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945). Respondents apparently agree, as they stated in their motion for stay of discovery, *supra*, pp. 9-10.

stitutional rather than statutory rights and procedures; and they have never been fully adjudicated by this Court.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

CLIFFORD J. HYNNING
1821 Jefferson Place, N. W.
Washington 6, D. C.

*Of Counsel:*
ALLEN S. OLMSTED, 2ND, ESQ.
SAUL, EWING, REMICK & SAUL
Packard Building
Philadelphia 2, Pa.

# APPENDIX A

## AMENDMENT 5

### To The Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## EXECUTIVE ORDER 10450

### SECURITY REQUIREMENTS FOR GOVERNMENT EMPLOYMENT

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and proceedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 632, et seq.); section 9 A of the Act of August 2, 1939, 53 Stat. 1148 (5 U.S.C. 118 j); and the act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1, et seq.), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

* * * *

Section 8 (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

* * * *

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
April 27, 1953.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington

ORDER No. 2738 November 9, 1953
Subject: Security Regulations

## GENERAL

Sec. 1 Purpose.
2 Definitions.

## SECURITY REQUIREMENTS FOR EMPLOYMENT

3 Policy.
4 Standards.
5 Security Classification of Positions.
6 Security Investigations.
7 Re-employment of Employee Terminated as Security Risk.
8 Review of Full Field Investigations Conducted under Executive Order 9835.
9 Accessibility to Confidential Security Information.
10 Clearance for Non-sensitive Positions.
11 Clearance for Sensitive Positions.
12 Action of the Director of Security.
13 Termination of Temporary and Probationary or Trial Employees.
14 Criteria for Suspension or Reassignment.
15 Notification to Employee of Suspension or Reassignment.
16 Appeal Procedure.
17 Further Appeal Rights.
18 Pay and Restoration of Pay of Suspended Employees.
19 Establishment of Security Hearing Board.
20 Functions with Respect to Security Hearing Board.
21 Hearing Procedure.
22 Revocations.

## GENERAL

Sec. 1 *Purpose.*

(a) If the duly constituted Government and the national Security of the United States are to be protected and made secure, it is imperative that all persons engaged in any capacity in the departments and agencies of the Government shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States. This order is issued so that the Department of the Interior may have a program designed to insure that the personnel in its employment meet the minimum requirements considered necessary to protect and make secure the Government and the national security.

(b) The regulations in this order are designed to achieve two objectives: first, to make sure that all employees are unquestionably and trustworthy in their capacity as citizens engaged in government activities conducted under our constitutional form of government, second, to guard security information or material, the disclosure of which, would have an adverse effect on national security.

(c) This order prescribes for all bureaus and offices of the Department the procedures, standards and criteria for carrying out these objectives and are issued in accordance with the act of August 26, 1950 (5 U.S.C. 1946 ed., Supp. V, secs. 22-1, 22-2, 22-3), and Executive Order 10450 of April 27, 1953 (18 F. R. 2489), as amended.

* * * * *

Sec. 3. *Policy.*

(a) It shall be the policy of the Department, based on the act of August 26, 1950 (64 Stat. 476) and Executive Order No. 10450 of April 27, 1953, as amended, to em-

ploy and to retain in employment only those persons who are reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States in their capacity as citizens engaged in government activities conducted under the constitutional form of Government of the United States.

(b) No person shall be employed, or retained as an employee, in the department unless the employment of such person is clearly consistent with the interests of the national security.

• • • • •

Sec. 6. *Security Investigations.*

(c) *Temporary and Intermittent Employees.* Certain employees in non-sensitive positions whose term of employment is for 6 months or less are, subject to the approval of the Civil Service Commission, exempted from the investigations normally required for non-sensitive positions. Special instructions will be issued concerning such employees by the Director of Security.

• • • • •

Sec. 13. *Termination of Temporary and Probationary or Trial Employees.* The regulations in this order are not intended to take away any authority which the appointing officer may have to terminate, for cause, temporary and probationary or trial employees.

Sec. 15. *Notification to Employee of Suspension or Reassignment.*

(a) A written statement of charges shall be furnished the employee within 30 days after his suspension or temporary reassignment. The statement shall also inform the employee of his privileges under sec. 16 and if appropriate Sec. 17 of this order. This statement shall be as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit, and shall be subject to amendment within 30 days of issuance.

(b) A copy of these regulations shall accompany the statement furnished the employee. The text of Executive Order 10450 and the act of August 26, 1950, are included in these regulations as Appendix C and D respectively.

Sec. 16. *Appeal Procedure.*

(a) An employee shall be afforded an opportunity to submit affidavits and statements and to answer such charges within 30 days after the receipt of the statement of such charges, or within 30 days after the receipt of an amendment thereof.

(b) Statements in refutation of the charges and supporting documents shall be considered by the Security Legal Officer and the Director of Security, who shall make a joint recommendation to the Secretary for the disposition of the case. If the Security Legal Officer and Director of Security are in disagreement, individual recommendations shall be made by them.

(c) Final decision as to termination of the employee will be made by the Secretary.

(d) A written statement of the decision of the Secretary shall be furnished the employee.

(e) Copies of notices of all personnel actions taken in the case shall be supplied by the bureau or office to the Civil Service Commission.

Sec. 17. *Further Appeal Rights. Permanent or Indefinite Employees.* An employee who is suspended or temporarily reassigned and who is a citizen of the United States and has a permanent or indefinite appointment and has completed his probationary or trial period shall, if he requests, be given a hearing before a security hearing board, constituted and conducting hearings as provided in this order. The decision of the hearing board will be reviewed and considered by the Secretary before a deter-

mination is made with respect to the termination of the employee.

• • • • •

Sec. 21. *Hearing Procedure.* The following hearing procedure shall be strictly adhered to:

(a) Hearings before security hearing boards shall be conducted in an orderly manner and shall be expedited as much as possible.

(b) Testimony before the hearing board shall be given under oath or affirmation.

(c) The hearing board shall take whatever action is necessary to insure the employee of a full and fair consideration of his case. The employee shall be informed by the board of his right:

(1) To participate in the hearings;

(2) To be represented by counsel of his choice;

(3) To present witness and offer other evidence in his behalf and in refutation of the charges brought against him; and

(4) To cross-examine any witness offered in support of the charges.

• • • • •

(e) Both the Department and the employee may introduce such evidence as the hearing board may deem proper in the particular case. Rules of evidence shall not be binding on the board, but reasonable restrictions shall be imposed as to relevancy, competency, and materiality of matters considered, so that the hearings shall not be unduly prolonged. If the employee is or may be handicapped by the non-disclosure to him of confidential information or by lack of opportunity to cross-examine confidential informants, the hearing board shall take that fact into consideration. If a person who has made charges against the employee and who is not a confidential in-

formant is called as a witness but does not appear and refuses either to permit his deposition to be taken or to answer written interrogatories, his action in this regard shall be considered by the board in evaluating such charges.

• • • •

(i) Hearing boards shall conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources or methods.

• • • •

(k) The board shall reach its conclusions and base its determinations on the transcript of the hearing, together with such confidential information as it may have in its possession. The conclusions and recommendations of the Board with respect to the employee against whom the charges have been made should specifically include a recommendation that the services of the employee be terminated or that termination is not warranted. The board, in making its determination, shall take into consideration the inability of the employee to meet charges of which he has not been advised because of security reasons, specifically or in detail, or to attack the credibility of witnesses who do not apear. The recommendations of the board shall be in writing and shall be signed by a majority of the members of the board. The recommendations of the board, and the complete record of the case, including investigative reports, shall be sent to the Secretary for use in his final review of the case.

• • • • •

Sec. 22. *Revocations.* This order supersedes all previous Departmental security regulations and Secretarial Orders Nos. 2308, as amended, 2459, 2460, 2488, 2489, 2490, as amended, 2491, 2538, and sections 6 and 7 of 2609, as amended.

/s/ DOUGLAS MCKAY
*Secretary of the Interior*

APPENDIX B-1

Guam News
GUAM SATURDAY, March 13, 1954
FIVE CENTS

answer the call
1954 RED CROSS CAMPAIGN
JOIN and SERVE!

# Globe In Trust Isles

# FIVE EMPLOYEES WILL BE OUSTED AS 'BAD RISKS'

Five Trust Territory personnel with several years service in the area are to be asked to resign as "security risks," Trust Territory High Commissioner Frank Midkiff confirmed yesterday.

Midkiff said the five are "scattered in various districts" of the Trust Territory and are the only ones of the 242 Americans employed in the territory to be under suspicion.

In almost every case, he said, the suspect will be permitted to resign, unless he chooses to fight. At least one has intimated he will demand a further hearing, Midkiff said.

Allegations are based on activities before coming to the territory, he continued and the suspects have been here "two or three years."

Midkiff stressed that the loyalty and patriotism of the five are not at issue.

"I doubt very much," he said firmly, "that any of them were mixed up with the Communist Party in the past."

Obviously disturbed by his distasteful chore of asking the resignations during his current tour of the islands and hesitant to discuss details of individual cases, he gave as an example of a security risk a known conscientious objector, saying that an advocate of pacifism is out of place in so sensitive and strategic an area as the trust territory.

There is no question of disloyalty," he repeated.

Saying that it was an extremely difficult subject for him to discuss, Midkiff concluded:

"There are many conscientious and able people who, not because of their disloyalty or lack of patriotism, are judged best located elsewhere than in some possibly very sensitive area."

Asked if this meant the five would be relocated within the department of interior, Midkiff said sadly that he doubted it, because of the recent reductions in force for budgetary reasons.

Daily News
GUAM
AGANA, GUAM SATURDAY, March
VOL. X NO. 62

# Security Probe In

will demand a further hearing, Midkiff said.

Allegations are based on activities before coming to the territory, he continued and the suspects have been here "two or three years."

Midkiff stressed that the loyalty and patriotism of the five are not at issue.

"I doubt very much," he said firmly, "that any of them were mixed up with the Communist Party in the past."

Obviously disturbed by his distasteful chore of asking the resignations during his current tour of the islands and hesitant to discuss details of individual cases, Midkiff attributed his mission to the federal government's security program.

"Security due to the pressure of Communism is of increasing concern to our government," he said, choosing his words carefully.

"The President has ordered a new look through all departments of the government, particularly in any sensitive areas and positions to make sure they are safe and that no undue chances are being taken

"There have not been very many new cases found — only a few, according to the President.

"The security section of each department in the government has restudied all cases, made their own decisions and reported to the secretaries of the departments, who have taken action.

"It is an attempt to be unusually cautious because of the new and mounting steps in international tension," he said.

would be relocated within the department of interior, Midkiff said sadly that he doubted it, because of the recent reductions in force for budgetary reasons.

## APPENDIX B

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

*PERSONAL*

*Registered Mail*
*Return Receipt Requested*
*Air Mail*

Memorandum

To: Mr. William Vincent Vitarelli
Education and Training Specialist
Office of the High Commissioner
Trust Territory of the Pacific Islands
Honolulu, T. H.

From: The Secretary of the Interior

Subject: Suspension under Executive Order 10450 and Public Law 733, and Department Order 2738

1. By virtue of the authority vested in me by Executive Order 10450 dated April 27, 1953 (18 F. R. 2489) and the Act of August 26, 1950, (5 U.S.C., 1946 ed., Supp. V, Sec. 22-1 *et seq.*) as implemented by Departmental Order 2738, you are hereby notified that you are suspended from duty without pay and such suspension shall be effective at the close of business of the 2d day of April, 1954.

2. The reasons for your suspension and the charges against you, which are as specific as security interests permit, are as follows:

(a) That during the years 1941 to 1945, inclusive, but not limited thereto, you were either a member of, affiliated with, or in sympathetic association with the Communist Party, and members of the Communist Party, including

but not limited to the following particulars as to such affiliation and sympathetic association, to-wit:

(1) During the years 1941 to 1945, inclusive, but not limited thereto, you were in sympathetic association with persons who were members of, affiliated with, or in sympathetic association with the Communist Party, including but not limited to the following named persons, to-wit: F———, also known as F———; W———, also known as W———; and W———, also known as W———.*

(2) In the year 1945 while you were a resident of New York City you registered a preference for the American Labor Party; the American Labor Party within New York City has been cited as being under the domination and control of the Communist Party or members thereof by a Special Committee on Un-American Activities of the House of Representatives of the United States, and by the State of California Committee on Un-American Activities.

(3) In your answer under oath of October 13, 1952, to the then Interior Department Loyalty Board you stated in effect that during the time you were teaching at Teachers College of Columbia University you subscribed to the USSR Information Bulletin and that you (and others interested) brought copies of the Daily Worker and of the New Masses.

The USSR Information Bulletin is the official publication of the Government of Soviet Russia and the Daily Worker and the New Masses are Communist publications which have been cited numerous times by the Special Committee on Un-American Activities of the House of Representatives of the United States.

It is noted that you also stated in connection with the above that bulletins from numerous other nations

* Full names deleted in printing.

and many other publications were taken or procured and that the purpose of all the publications was to have on hand information about various countries of all political orientations. The purpose of this paragraph is to present the facts in connection with all of said publications and allow an inquiry into the purpose of the same.

(4) In your said answer under oath of October 13, 1952, hereinabove mentioned, you stated with regard to your acquaintance and association with the said F——— and the said W———, hereinabove named, in brief as follows: Re F———; that you were not certain of his identity but believed he was the person you met in Georgia as F——— and that you would extend as much information as you could remember about F———. This information was to the effect that you were introduced to Mr. F———, may have had another personal contact with him, but were not sure, and had a faint recollection that you may have written him one letter, but that your association with him was rather casual and short lived, and that you never knew he was connected with any Communist front; Re W———; That you did know Mr. W——— and had several visits and associations with him solely as a professional matter, as detailed in your said answer, and no other associations with him, but you never knew he was a member of or a leader in the Communist Party.

As to these associations it is alleged: That in fact your associations with the said F——— were not fully divulged by you and that same were not casual but on the contrary were the associations of an intimate friendship; that in fact your associations with the said W——— were not fully divulged by you in that such associations were not solely connected with your teaching profession; and that you did know that

both the said F——— and the said W——— were members of, affiliated with, or in sympathetic association with the Communist Party and numerous Communist front organizations.

(b) The Communist Party is a totalitarian and subversive organization which has adopted, maintained, and showed a policy of advocating or approving the commission of acts by force or violence to deny persons their rights under the Constitution of the United States and which has sought and now seeks to alter the form of the government of the United States by unconstitutional means. The Communist Party has been designated by the Attorney General of the United States as being within the purview of section 8(a)(5) of Executive Order 10450.

3. Your behavior, activities and associations tend to show that you are not reliable or trustworthy, and the facts above alleged furnish reason to believe that you have deliberately misrepresented, falsified or omitted material facts in connection with your said behavior, activities and associations, and these facts also furnish reason to believe that you may be subjected to coercion, influence, or pressure which may cause you to act contrary to the best interests of national security.

4. You are hereby advised of your right and opportunity to submit any statements, answer, or affidavits to the Secretary of the Interior within 30 days after receipt of this notice to show why you should be reinstated or restored to duty. All such statements, answer, and affidavits should be sworn to under oath and it should be noted that any deliberate misrepresentations, falsifications, or omission of material facts may constitute sufficient basis for removal. You may also request a hearing before a board duly constituted for that purpose. I will review and consider such statements, answer, and affidavits, if any are submitted by you, and the recom-

mendation of the hearing board if a hearing is requested, and within 30 days thereafter you will be notified of my decision to either terminate your employment if I shall determine that such termination is necessary and advisable in the interests of the national security of the United States, or to reinstate you to your former employment. If you are reinstated you shall be allowed compensation for all of the period of your suspension, but the amount shall not exceed the difference between the amount you would normally have earned during the period of suspension at the rate you were receiving on the date of your suspension and your interim net earnings.

5. There is enclosed a copy of Departmental Order No. 2738 to which are attached copies of Executive Order 10450 and Public Law 733 (The Act of August 26, 1950).

/s/ DOUGLAS MCKAY
*Secretary of the Interior*

Enclosure

Cases—Continued


| | Page |
|---|---|
| *Cole* v. *Young*, 351 U.S. 536 | 5, 9, 12, 14, 20, 21, 24 |
| *Eberlein* v. *United States*, 257 U.S. 82 | 13 |
| *Ellmore* v. *Brucker*, 236 F. 2d 734 | 13 |
| *Green* v. *Baughman*, 243 F. 2d 610 | 13 |
| *Greene* v. *McElroy*, No. 180, Oct. Term, 1958 | 13, 14, 18 |
| *Hargett* v. *Summerfield*, 243 F. 2d 29 | 13 |
| *Harmon* v. *Brucker*, 355 U.S. 579 | 22 |
| *Hennen, Matter of*, 13 Pet. 230 | 14 |
| *Keim* v. *United States*, 177 U.S. 290 | 13 |
| *Keyton* v. *Anderson*, 229 F. 2d 519 | 13 |
| *Kohlberg* v. *Gray*, 207 F. 2d 35, certiorari denied, 346 U.S. 937 | 13, 23 |
| *Leiner* v. *United States*, Ct. Cls. M. 576–57 | 26 |
| *Lerner* v. *Casey*, 357 U.S. 468 | 24 |
| *Moog Industries* v. *Federal Trade Comm'n*, 238 F. 2d 43 | 18–19 |
| *Myers* v. *United States*, 272 U.S. 52 | 13 |
| *National Labor Relations Board* v. *Mackay*, 304 U.S. 333 | 18 |
| *Perkins* v. *Elg*, 307 U.S. 325 | 22 |
| *Peters* v. *Hobby*, 349 U.S. 331 | 11, 14, 20, 24, 25 |
| *Reagan* v. *United States*, 182 U.S. 419 | 13 |
| *Saggau* v. *Young*, 240 F. 2d 865 | 13 |
| *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80 | 22 |
| *Service* v. *Dulles*, 354 U.S. 363 | 14, 15, 20, 24, 25 |
| *Slochower* v. *Board of Education*, 350 U.S. 551 | 14 |
| *Smith* v. *Dulles*, 236 F. 2d 739 | 13 |
| *Terry* v. *Stevens*, 203 F. 2d 219 | 13 |
| *United Public Workers* v. *Mitchell*, 330 U.S. 75 | 14 |
| *Wieman* v. *Updegraff*, 344 U.S. 183 | 14 |
| *Wiener* v. *United States*, 357 U.S. 349 | 13 |
| *Williams* v. *Cravens*, 210 F. 2d 874, certiorari denied, *sub nom. Williams* v. *Robbins*, 348 U.S. 819 | 13, 23 |
| Constitution and Statutes: | |
| Constitution of the United States, Article II: | |
| Section 2 | 13 |
| Section 3 | 13 |
| Act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22–1, 22–3) | 9, 17 |
| Section 1 | 3, 12, 16, 27 |
| Section 3 | 29 |

## APPENDIX C

Filed February 13, 1958. Joseph W. Stewart.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
January Term, 1958.

No. 13,708

C. A. 2870-56

WILLIAM VINCENT VITARELLI, Appellant,

v.

FRED A. SEATON, Secretary of the Interior of the United States, et al., Appellees.

APPEAL FROM the United States District Court for the District of Columbia.

Before: FAHY, WASHINGTON and DANAHER, Circuit Judges.

### JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: Feb. 13, 1958

Per Circuit Judge WASHINGTON.

Separate dissenting opinion by Circuit Judge FAHY.

Constitution and Statutes—Continued Page

Lloyd-LaFollette Act, Sec. 6, 37 Stat. 555, as amended, 5 U.S.C. 652 ..... 11

Veterans' Preference Act of 1944, Sec. 14, 58 Stat. 390, as amended, 5 U.S.C. 863 ..... 11, 20

28 U.S.C. 1346(d)(2) ..... 25

28 U.S.C. 1491 ..... 25

Miscellaneous:

Civil Service Regulations (5 C.F.R. 6.101(h)) ..... 3

Department of the Interior Order No. 2738 (Nov. 9, 1953) ..... 3, 17, 40

Executive Order 9835 (12 F.R. 1935) ..... 21

Executive Order 10450 (April 27, 1953; 18 F.R. 2489, as amended) ..... 3, 29

S. Rept. No. 2158, 81st Cong., 2d Sess., p. 2 ..... 16

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

---

No. 13,702

WILLIAM VINCENT VITARELLI, APPELLANT,

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR OF THE UNITED STATES, ET AL., APPELLEES.

---

Appeal from the United States District Court
for the District of Columbia

---

Decided February 13, 1958

*Mr. Clifford J. Hynning* for appellant.

*Mr. Donald B. MacGuineas, Attorney,* Department of Justice, with whom *Assistant Attorney General Doub,* and *Mr. Paul A. Sweeney, Attorney,* Department of Justice, were on the brief, for appellees.

Before FAHY, WASHINGTON and DANAHER, Circuit Judges.

WASHINGTON, *Circuit Judge:* This is a suit by a former Government employee, seeking reinstatement and declaratory relief.

Plaintiff-appellant occupied a position in the Department of the Interior, designated "Education and Training Specialist," which was excepted from the classified civil service. In early 1954, after some three years of employment, he was suspended by the Secretary of the Interior on charges (among other things) (1) that he was a member of, affiliated with, or in sympathetic association with, the Communist Party, (2) that his behavior, activities and

associations tended to show that he was not reliable or trustworthy, and (3) that he had "deliberately misrepresented, falsified or omitted material facts" in answering, under oath, questions addressed to him in 1952 by the Interior Department Loyalty Board. The charges were purportedly made pursuant to the Act of August 26, 1950, 5 U.S.C. § 22-1 (1952), and Executive Order No. 10,450, 18 FED. REG. 2489 (1953). Plaintiff-appellant filed an answer, together with some forty-four affidavits. He was given a hearing before a Security Hearing Board. Appellant was present in person, and had the services of counsel. He was not confronted with any witnesses. Certain confidential information was not disclosed to him. At the hearing, the Government attorney stated that appellant was not charged with disloyalty, and that the "question is only whether he is a security risk." Some weeks after the hearing, the Secretary of the Interior made findings sustaining the charges, and dismissed appellant. A rehearing was granted, and additional testimony taken. Reinstatement, however, was refused. Suit was then commenced in the District Court. The Government, as explained in the concluding paragraph of this opinion, thereafter issued a new notice of termination of appellant's employment, and expunged its records of adverse findings. Summary judgment was requested by the Government, and granted. This appeal followed.

Appellant's principal contention is that he must be reinstated because—as the Government admits—the position he occupied was not a sensitive one, and accordingly the Act of 1950 and Executive Order No. 10,450 could have no application to him, under the doctrine of *Cole* v. *Young*, 351 U.S. 536 (1956). The question is, then, whether *Cole* requires his reinstatement.

The decision of the Supreme Court in *Cole* was based on the traditional responsibility of the courts to insure that Government employees sought to be dismissed are given the benefit of all procedural protections required

by statute or regulation.[1] The Court laid down no general prohibition of dismissals on security or loyalty grounds. On the contrary, the Court said:

> "In interpreting the 1950 Act, it is important to note that the Act is not the only, nor even the primary, source of authority to dismiss Government employees. The general personnel laws—the Lloyd-La-Follette and Veterans' Preference Acts—authorize dismissals for 'such cause as will promote the efficiency of the service,' and the ground which we conclude was the basis for petitioner's discharge here—a reasonable doubt as to his loyalty—was recognized as a 'cause for dismissal under those procedures as early as 1942. . . . Thus there was no want of substantive authority to dismiss employees on loyalty grounds, and the question for decision here is not whether an employee *can* be dismissed on such grounds but only the extent to which the summary *procedures* authorized by the 1950 Act are available in such a case." (pp. 543-44) (Emphasis in original.)

The inquiry in *Cole* was, therefore, a procedural one. The plaintiff in that case was a veteran. Notwithstanding that fact he was denied the protections and procedures of the Veterans Preference Act. The Supreme Court held that he should have been given the benefits of that Act and remanded the case to the District Court for appropriate proceedings. Similarly, in *Service* v.

---

[1] See also Service v. Dulles, 354 U.S. 363 (1957) (non-compliance with regulation); Peters v. Hobby, 349 U.S. 331 (1955) (non-compliance with Executive Order No. 9,835). For examples in this court see Kerr v. Barnes, 100 U.S.App. D.C. 51, 242 F.2d 24 (1956); Kutcher v. Higley, 98 U.S.App. D.C. 278, 235 F.2d 505 (1956); Haynes v. Thomas, 98 U.S. App.D.C. 131, 232 F.2d 688 (1956); Burrell v. Martin, 98 U.S.App.D.C. 33, 232 F.2d 33 (1955); Flanagan v. Young, 97 U.S. App.D.C. 119, 228 F.2d 466 (1955); Mulligan v. Andrews, 93 U.S.App.D.C. 375, 211 F.2d 28 (1954); Money v. Anderson, 93 U.S.App.D.C. 130, 208 F.2d 34 (1953). See also Powell v. Brannan, 91 U.S.App.D.C. 16, 196 F.2d 871 (1952), and cases cited.

*Dulles*, 354 U.S. 363 (1957), the dismissed employee was an officer in the Foreign Service of the United States "and as such was entitled to the protection of the Foreign Service Act of 1946, as amended. 22 U.S.C. § 801, *et seq.*" 354 U.S. 371 at n. 12. As the Supreme Court pointed out, the procedures required by that Act were not afforded to him. When the Supreme Court held that the action which the Government had taken in an effort to dismiss Service was invalid, it thus became clear (as was true in *Cole*) that if the Government wished to press its charges once more it must do so under the required statutory procedure. In the case at bar the petitioner had no prescribed tenure of office and is not a veteran, nor a member of the Foreign Service, nor in any other specially-protected group. He is not a member of the classified civil service and accordingly is not entitled to such protection as the Lloyd-LaFollette Act gives. 37 STAT. 555 (1912), 5 U.S.C. § 652 (1932). Nor, of course, is he entitled to the procedural protections provided by the Act of August 26, 1950, which has no application to him.[2]

Persons situated as was the appellant are, we may assume, entitled to be free from dismissal on unconstitutional or flagrantly arbitrary grounds. *Wieman* v. *Updegraff*, 344 U.S. 183, 191, 192 (1952); *McGinty* v. *Brownell*, — U.S.App.D.C. —, 249 F.2d 124 (1957). But no such

[2] Where the Executive extended—by Executive Order No. 10,450—the provisions of the 1950 Act to employees in sensitive positions who might not, under that Act standing alone, be entitled to the procedural protections outlined in the Executive Order, this court held the Government to observance of those protections. Haynes v. Thomas, *supra* note 1 (probationary employee in Navy Department held entitled to protections of Executive Order No. 10,450). But where, as here, the employee is not in a position declared sensitive, the 1950 Act and the Executive Order are inapplicable to him, under the rule in *Cole*. The decision in Service v. Dulles, *supra* note 1, relied on by appellant, is not pertinent unless statues or regulations "were indeed applicable and were violated." 354 U.S. at 373.

dismissal occurred here. Dismissal on loyalty or security grounds certainly is not unconstitutional *per se*; the Supreme Court's language in *Cole* refutes any contention of that sort.[3] And the treatment accorded appellant was in no way arbitrary, or lacking in due process. He was given written charges, and an opportunity to answer them, together with a hearing. This was more than he was entitled to under any statute or regulation applicable to persons of his employment status.

It is true, as appellant urges, that an administrative order "cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943).[4] But, as the Supreme Court made clear in the second *Chenery* case, the courts will disturb the agency's conclusion "only if it lacks *any* rational and statutory foundation." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207 (1947). (Emphasis supplied.) In this case there was clearly a "rational" foundation for the Secretary's dismissal of appellant. There was also a sufficient "statutory" foundation—the constitutional power of the Executive to dismiss subordi-

---

[3] This court has said: "It is our clear opinion that the President, *absent congressional restriction*, may remove from Government service any person of whose loyalty he is not completely convinced." Bailey v. Richardson, 86 U.S. App.D.C. 248, 267, 182 F.2d 46, 65, *affirmed by an equally-divided court*, 341 U.S. 918 (1951). (Emphasis added.)

In *Cole* and *Service* the Supreme Court held that there were "congressional restrictions" on dismissal which the Government had failed to observe. In the instant case there were no such restrictions.

[4] We reecntly applied that rule where the Secretary of State relied exclusively on a particular regulation in denying a passport to an applicant, but failed to make the findings which that regulation required. Boudin v. Dulles, 98 U.S. App.D.C. 305, 235 F.2d 532 (1956).

nates: a power not limited in the present instance by statute or regulation.[5]

For these reasons, we find that appellant was legally discharged, even though the proceedings were improperly labelled as being brought under the authority of the Act of 1950 and Executive Order No. 10,450. He was not deprived—in contrast to the situation in *Cole* and *Service*—of any procedural right or protection to which he was entitled. It may be noted, too, that one of the grounds of dismissal furnishes a clear basis for the Secretary's action, quite apart from the questions raised by the appellant. Charge 3 against appellant reads as follows:

> "3. Your behavior, activities and associations tend to show that *you are not reliable or trustworthy*, and the facts above alleged furnish reason to believe that *you have deliberately misrepresented, falsified or omitted material facts* in connection with your said behavior, activities and associations, and these facts also furnish reason to believe that you may be subjected to coercion, influence, or pressure which may cause you to act contrary to the best interests of national security." (Emphasis added.)

The charge of untrustworthiness and deliberate misrepresentation was found by the Secretary of the Interior to have been sustained on the evidence before him.

There is no basis on which we can weigh the evidence, or conclude that the Secretary's action in dismissing appellant could not properly be rested on that ground. The power of the Executive to discharge for untrustworthiness or deliberate misrepresentation is beyond dispute, even under the here inapplicable Lloyd-LaFollette and Veterans' Preference Acts. See *Williams* v. *Cravens*, 93 U.S.App.D.C. 380, 381, 210 F.2d 874, 875, cert. denied sub nom. *Williams* v. *Robbins*, 348 U.S. 819 (1954); *Kohlberg* v. *Gray*, 93 U.S.App.D.C. 97, 207 F.2d 35 (1953), cert.

---

[5] See footnotes 2 and 3, *supra*.

denied, 346 U.S. 937 (1954). And, so long as one [6] of the grounds announced appears rational and proper, courts have refused to review the evidence or to examine the merits of the executive officer's finding.[7] It is not our function to decide whether appellant was or was not untrustworthy, or a "security risk."

An additional point remains. Appellant asserts that the Secretary's action illegally fastened upon him a "badge of infamy," which can be removed only by his reinstatement. We think, however, that the Secretary's mistaken reliance on the Act of 1950 and Executive Order No. 10,450 does not require the relief appellant asks. The record shows that appellant's notice of termination, as originally issued, stated that action was "being taken in accordance with the provisions of Executive Order 10450." But, two years later, after suit had been brought in the District Court, a new notice was issued which omitted the quoted statement. An affidavit was also filed by an official of the Civil Service Commission stating that "all records of the said Commission have been expunged of all adverse findings made with respect to Mr. William Vincent Vitarelli under Executive Order 10450." We think that this voluntary action by the Government is equivalent to the maximum relief a court might have been justified in granting under all the circumstances of the case. See *Peters* v. *Hobby*, 349 U.S. 331, 349 (1955);

---

[6] See Deviny v. Campbell, 90 U.S.App.D.C. 171 at 174, 194 F.2d 876 at 879, *cert. denied*, 344 U.S. 826 (1952). *Cf.* Kuhn v. Civil Aeronautics Board, 87 U.S.App.D.C. 130, 183 F.2d 839 (1950). The circumstance that the third ground of dismissal was intimately related to the first two grounds would seem immaterial here.

[7] Keim v. United States, 177 U.S. 290 (1900); Eberlein v. United States, 257 U.S. 82 (1921); Levine v. Farley, 70 App.D.C. 381, 107 F.2d 186 (1939), *cert. denied*, 308 U.S. 622 (1940); Carter v. Forrestal, 85 U.S.App.D.C. 53, 175 F.2d 364, *cert. denied*, 338 U.S. 832 (1949).

*Service* v. *Dulles*, 98 U.S.App.D.C. 268, 272, 235 F.2d 215, 219 (1956), rev'd on other grounds, 354 U.S. 363 (1957).

*Affirmed.*

FAHY, *Circuit Judge, dissenting:* The original termination action of the Secretary, effective September 10, 1954, was explicitly rested by him upon Executive Order 10450,[1] which in turn rested upon the Act of August 26, 1950.[2] This appears upon the face of the Secretary's "Findings and Final Determination" and from the "Notification of Personnel Action."

I cannot read Charge 3, referred to by the majority, or any finding of the Secretary based thereon, as in any sense independent of executive Order 10450 or the Act of August 26, 1950.

It is conceded that under the decision of the Supreme Court in *Cole* v. *Young*, 351 U.S. 536, said Executive Order and Act did not authorize the Secretary's action in this case. Accordingly, the basis for the original termination disapears, and with it the validity of that termination.

On October 12, 1956, a second "Notification of Personnel Action" was delivered to appellant. This in terms purported to terminate the employment as of the date of the original termination, September 10, 1954, and was not based upon Executive Order 10450 or the Act of August 26, 1950. But this action of course could not relate back as attempted, and at most could be effective only as of the time it was taken, October 12, 1956.

---

[1] 18 Fed. Reg. 2489 (1953).

[2] 64 Stat. 476, 5 U.S.C. § 22-1 (1952).